

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE - SEALED

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Monday, March 2, 2015
2:40 p.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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On Behalf of the Defendant

P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 2:40 p.m.)

THE CLERK: The United States District Court for the District of Massachusetts. Court is in session. Please be seated. For a motion hearing in the case of United States v. Dzhokhar Tsarnaev, 13-10200.

Will counsel identify yourselves for the record, please.

00:10 10 MR. WEINREB: Good afternoon, your Honor. William Weinreb for the United States.

12 MR. CHAKRAVARTY: As well as Aloke Chakravarty, your Honor.

14 MS. PELLEGRINI: Good afternoon, your Honor. Nadine Pellegrini.

16 MR. MELLIN: Steve Mellin.

17 MR. BRUCK: Good afternoon, your Honor. David Bruck, Miriam Conrad, Judy Clarke, Tim Watkins and Bill Fick for the defendant.

00:11 20 THE COURT: You did that without looking.

21 (Laughter.)

22 THE COURT: I gather the defendant has elected not to be present?

24 MR. BRUCK: That's correct.

25 THE COURT: Okay. I thought we'd start -- Jim

1 McAlear's here -- and talk a little bit just about the
2 mechanics of the exercise peremptories. Let me just say I'm
3 still reading materials about motions to remove from the
4 qualified list people. I expect to have that first thing in
5 the morning for you. There are still some transcripts I want
6 to read. So I think you'll know first thing in the morning, so
7 you may have to plan accordingly, but I'm sure you will.

8 So I've given it a good bit of thought, I think, and
9 I'm inclined with what the government has suggested as a method
00:11 10 of approaching the entire panel of, in the first instance, 52
11 and then 12. And my principal reason for that is I think it
12 maximizes for both sides the utility of the peremptory
13 challenges. It makes it more likely that more peremptories
14 will be used than if we proceeded in the other way. And I
15 think that's consistent with what I think is the clear purpose
16 of the extra peremptories in the rule for death cases, that the
17 parties have greater ability to excuse people by reason of
18 peremptory. So I think that's what we'll do. Anybody in the
19 panel is open to the strikes. And I think the suggestion of
00:12 20 going two by two is fine.

21 I guess what I haven't resolved is how physically we
22 do that. It's not -- it's literally not necessary to have the
23 jurors here in the courtroom to do that. In another case, an
24 ordinary case, we would be doing it at sidebar so neither the
25 jurors nor the public would know which side was responsible for

1 which strikes, and I think that's important to maintain. So it
2 is possible to do it entirely on paper, I guess.

3 I do have some sense that it should be a public
4 proceeding, the public part, but not necessarily that the
5 information should be public. In other words, it could be
6 observed being done without -- but I'm not sure how to do that.
7 So I invite any -- since it was the government's idea, maybe
8 they should have some ideas about this.

9 MR. MELLIN: Your Honor, I guess if I can comment on
00:13 10 that, the one way that I've seen this handled is that each side
11 is exercising their strikes. The Court looks at the two and
12 two. We submit those up to the Court, the Court looks at that,
13 records the information, it comes back again to us to again
14 exercise two and two, that information goes to the Court. At
15 no time, though, is the Court excusing Juror 22 and 48 at that
16 point in time; it's only at the end that the Court would then
17 excuse the 40 jurors that had been stricken.

18 THE COURT: So on that, you'd hand them up and I'd
19 review them for my own purposes but not announce them. Is that
00:14 20 it?

21 MR. MELLIN: Correct.

22 THE COURT: And then they would all be announced en
23 masse at the end: The following 40 jurors are excused?

24 MR. MELLIN: Yes.

25 MR. BRUCK: Sounds fine.

1 THE COURT: Are the bodies in the courtroom?

2 MR. MELLIN: I would suggest the bodies be in the
3 courtroom just so we all have a chance to look at the jurors
4 once again before we do this process.

5 THE COURT: Okay.

6 MR. MELLIN: Typically --

7 THE COURT: We might use the box but there are
8 different ways of doing it. The easiest way would simply to be
9 go in sequence and put the first 18 in even though that would
00:14 10 not actually have any alternates there. That would be the
11 difference from reality. In other words, they would all be
12 part of the 52 rather than -- the first 52 rather than the
13 second 12.

14 MR. BRUCK: Well, of course, with back-striking it's
15 quite arbitrary who's in the box and who's in the audience.

16 THE COURT: Right. It takes up fewer seats in the
17 audience so more people could be here. That's one thing.

18 MS. CLARKE: Judge, if you put them all in the
19 audience and the parties sit on this side of the table, they
00:15 20 can see the jurors and you're not straining around to figure
21 out who's there. If you need some room for the public, they
22 could enjoy the jury box.

23 THE COURT: I doubt we'd do that, but -- well, we have
24 74, I think, right? That's what we hope will show up.

25 MR. McALEAR: Yes, your Honor.

1 (Laughter.)

2 THE COURT: That reminds me. I should tell you that
3 there is one that -- late last week a juror remembered a March
4 vacation that began today, and we told her to go.

5 MS. CLARKE: And who is that?

6 THE COURT: Do you remember the number offhand?

7 MR. McALEAR: Yes. It's Juror No. 60.

8 THE COURT: Yes. Juror No. 60. Okay. So she's
9 flying south someplace, I imagine.

00:16 10 On that score, one juror was postponed for a similar
11 reason and we never actually got to him by the time we
12 suspended. So that's Juror No. 647 who was effectively skipped
13 over in the sequence. So if there's any problem with that, we
14 can address it. If the parties have no problem with the fact
15 that he would be skipped in the sequence and never reached.

16 (Counsel confer off the record.)

17 MS. CLARKE: Did the Court plan on voir diring him?

18 THE COURT: That's an option. We can have him come in
19 tomorrow morning and do that. And I suppose if we went that
00:17 20 course, then we could insert him in his sequence.

21 (Counsel confer off the record.)

22 THE COURT: If you want, I have his questionnaire
23 here, if anyone wants to look at it.

24 MS. CLARKE: That would be great. May I approach?

25 THE COURT: Sure. Paul?

1 MR. MELLIN: May I look on, your Honor?

2 THE COURT: Yes, of course. Of course.

3 (Counsel confer off the record.)

4 MR. BRUCK: We're content to just dismiss the juror.

5 THE COURT: Yeah, I would just note he would be Number
6 71 in our sequence. So it might be entirely moot, it might
7 not, but he would be up there.

8 MR. MELLIN: I agree, your Honor.

9 THE COURT: So both parties are content if we just
00:21 10 skip over him, treat him as effectively excused?

11 MR. MELLIN: Yes.

12 MR. BRUCK: Yes.

13 THE COURT: Okay. He's still -- he's still on the
14 hook for his nightly phone call, so we'll release him.

15 So we'll do as we discussed last week, I think 52 for
16 the jury proper and then the next -- so the question -- I don't
17 know whether this will arise or not, but if it were to be the
18 case that the total peremptories exercised actually were less
19 than 20 per side, we would slide the 12 down so that they would
00:21 20 be -- they would match in sequence. In other words, if instead
21 of 40 being excused only 38 were, then it would have been -- 39
22 and 40 would become 1 and 2, basically, okay? And a similar
23 adjustment at the other end.

24 MS. CLARKE: The alternate pool would begin where --

25 THE COURT: The alternate pool would drop down to

1 where the jury pool ended if you didn't use --

2 MR. BRUCK: Drop down or move up?

3 MS. CLARKE: It would move up, essentially.

4 (Laughter.)

5 MS. CLARKE: Try not to confuse us.

6 MR. BRUCK: Do you mean no matter what the alternate
7 pool will begin at 53, or do you mean that it will slide up so
8 that the first -- the alternate selection -- if two
9 peremptories went unused, then we would start at 51 with the
00:22 10 alternates? Is that what the Court --

11 MS. CLARKE: Yes, that's what I hear.

12 MR. BRUCK: -- meant to say?

13 THE COURT: If at the end of the jury proper
14 selection, instead of 52 jurors having been addressed, 12
15 remaining, 40 excused, only 50 had been, then the first
16 alternate -- the alternate panel of 12 would begin at 51.

17 MR. BRUCK: Gotcha. Okay.

18 THE COURT: I don't know whether that's up or down.

19 (Laughter.)

00:23 20 THE COURT: All right.

21 MS. CLARKE: Judge, if I might on the question of the
22 Court's rulings on the strikes that are pending, if the Court
23 makes a decision tonight late, is there some way to let us know
24 or do you think it won't be made until we're in the courtroom?

25 THE COURT: I haven't thought that through. I don't

1 know.

2 MS. CLARKE: A tug on your left ear would mean
3 granted.

4 THE COURT: Okay. When the jury has been selected, we
5 have 18 people, they will get a little orientation now that
6 they're really focused from Jim. That's customary. It will
7 include the details about how their transportation will be
8 arranged and what their days will be like, all very practical
9 kinds of things. We've talked about that -- I'm not sure if
00:24 10 we've talked recently about it, but I met with the marshals
11 last week and things are in progress to have them assemble
12 offsite, come into the building through the loading dock,
13 basically, just so they can all come in at once. They'll come
14 into the back of the house; they won't have to be exposed to
15 victims, witnesses, participants and so on and so forth. They
16 will have their lunches here.

17 It's acceptable to the marshals, and I have -- it was
18 my suggestion that they be allowed the use of their electronic
19 equipment during the lunch hour just for their convenience.
00:25 20 They will, of course, receive constant and strong reminders of
21 how to use it or not use it, but I thought it would just
22 relieve a little bit of the tension for them during the day if
23 they had an opportunity at lunch to check in at the office or
24 at home or whatever they might need to do.

25 After Jim is finished with that I would like to meet

1 informally with the jurors just to give them a bit of a pep
2 talk. And I would prefer to do it by myself just for the
3 environment. So if the parties would not object to that, I
4 would like consent to do that. If you want, we could put it on
5 the record. I would rather, again, be informal about it. I
6 just want to encourage them now that they're really focused
7 that it's going to be them, that we expect the highest duty
8 from them, so on, that kind of thing.

9 MR. WEINREB: We have no objection, your Honor.

00:26 10 MR. BRUCK: This was on the record but --

11 THE COURT: I was hoping to do it off the record
12 but -- just because it made it less formal for them, but if
13 they see a reporter sitting there...

14 MR. BRUCK: I understand the Court's preference, but
15 under the circumstances, I think we have to --

16 THE COURT: Okay. All right. We'll hide her behind a
17 screen.

18 (Laughter.)

19 THE COURT: It won't be long. It's just kind of a --
00:26 20 partly courtesy, I think, and partly a personal touch kind of
21 thing, so.

22 Okay. Are there any other juror-related --

23 MS. CLARKE: There are, your Honor. We have filed a
24 motion to strike the panel.

25 THE COURT: Oh, yeah. And so I was going to ask the

1 government whether it intends to formally oppose that or not.

2 MR. WEINREB: Your Honor, the government opposes the
3 motion. We didn't plan on filing a written response unless the
4 Court would like one, but we would incorporate by reference the
5 responses that we made during the course of the voir dire and
6 in the filings that were made in the Court of Appeals in
7 connection with this case, if that's acceptable to the Court.

8 THE COURT: I don't have all -- well, maybe I do.
9 Maybe I have them and I don't have them.

00:27 10 MR. WEINREB: They were served on the Court as a part
11 of the proceedings in the two mandamus --

12 THE COURT: Are they on the docket?

13 MR. WEINREB: They're on the docket in the Court of
14 Appeals.

15 THE COURT: Right. But here?

16 MR. WEINREB: They're not on the docket here. But I
17 don't know that the docket in the Court of Appeals isn't part
18 of the docket in this case.

19 THE COURT: Okay. All right. So I'll treat that as a
00:28 20 statement that the record is complete as to that motion and I
21 can proceed to decide.

22 MR. WEINREB: Yes. If the Court has any question
23 about whether those -- our filings in the Court of Appeals --

24 THE COURT: We can get them from the Court of Appeals'
25 docket.

1 MR. WEINREB: Or we could just file a one-page
2 opposition and fashion it --

3 THE COURT: I don't think that will be necessary.

4 MS. CLARKE: Your Honor, we also have a challenge to
5 the jury panel, the plan and the selection of jurors in the
6 district and how it played out and the randomness issue. We
7 filed that motion a week ago maybe.

8 THE COURT: I thought that's the one you were just
9 talking about.

00:29 10 MS. CLARKE: No, we filed a motion to strike the panel
11 based on what we've ended up with, and we also filed a
12 motion --

13 THE COURT: Oh, I guess I haven't seen that one. When
14 was that filed?

15 MR. FICK: The motion to strike the panel was filed
16 under seal on Friday. But previously, I'm not sure exactly
17 which day of the week it was filed, there was a public motion
18 filed under the statute and the jury plan. That's on the
19 public docket.

00:29 20 THE COURT: That's the one I'm aware of.

21 MR. FICK: There's two separate pending motions.

22 THE COURT: I wasn't aware of the second. I'll find
23 it. I was actually asking the government about the first.

24 MR. WEINREB: Oh, I see. Well, with respect to the
25 one that was filed under seal on Friday, we haven't had any

1 time to respond. That's why we said that we oppose it, but
2 we're not planning on filing a written response unless the
3 Court needs one other than what we just said.

4 With respect to the motion based on the jury plan, we
5 had prepared a written response which we will try to get filed
6 tomorrow.

7 THE COURT: Okay. As soon as possible. Both motions
8 have to be resolved before we swear the jury.

9 MS. PELLEGRINI: Tonight?

00:30 10 MR. WEINREB: Well --

11 MS. PELLEGRINI: I can't remember whether theirs was
12 filed under seal.

13 MS. CLARKE: Friday's was under seal and served on you
14 guys.

15 THE COURT: The other one was in the public.

16 MR. WEINREB: If the Court would give us permission,
17 we'll file it electronically tonight. It may not be before six
18 o'clock, which is the normal filing deadline.

19 THE COURT: That's all right.

00:30 20 MS. CLARKE: And one final matter with regard to the
21 jury and jury selection in this district, your Honor. We're
22 going to file this afternoon our fourth motion for change of
23 venue. It's largely a record preservation and gathering the
24 various parts of the record together before this Court but we
25 wanted to give you the heads-up that that will be filed this

1 afternoon. The Court can always change its mind but we thought
2 that it would be appropriate for the record to get it in.

3 THE COURT: I think the record is rather clear.

4 MS. CLARKE: Well, the record's rather clear that we
5 continue to lose the motion but we want to make sure that there
6 is no question of waiver --

7 THE COURT: The objection is lodged, but do whatever
8 you have to do.

9 MS. CLARKE: Thank you.

00:31 10 MR. CHAKRAVARTY: Your Honor, one other jury issue
11 just for my clarification. Maybe everybody else is clear on
12 it. But is it going to be the Court's practice after the
13 peremptories that both the jury as well as the alternates will
14 be selected by the lowest juror number first, essentially, for
15 each category? So it will be filling -- I just want to make
16 sure that that process --

17 THE COURT: Yes. Yes.

18 Okay. If that's all on the jury -- Jim, do you have
19 anything yourself?

00:31 20 MR. McALEAR: I do not, your Honor.

21 THE COURT: Okay. Then there are some pending motions
22 that I invite brief argument on. And as I said this morning,
23 these are -- I think these are all perhaps under seal although
24 I'm not sure they really need to be, particularly at this stage
25 and certainly not after the jury is actually seated, I don't

1 think. I mean, I don't think *Daubert* motions generally need to
2 be sealed, for example. We were doing it in aid of the jury
3 selection process so there wasn't a lot of discussion about
4 things that might not ever be in evidence while we were in that
5 sensitive stage, but it's not unusual for -- once the case gets
6 going, for things like that to be in the public record.

7 So why don't we start -- there are two *Daubert* motions
8 that I think you had indicated you needed to -- or would like
9 to have resolved before the openings. One is related to a DNA
00:32 10 matching and the other is related to polymer tapes and fiber
11 matching.

12 MR. WATKINS: They're both mine, your Honor, so your
13 choice. Which one would you like first?

14 THE COURT: Either one.

15 MR. WATKINS: In regard to the gloves, your Honor,
16 these are a pair -- well, they're unmatched golf gloves that
17 were found on the floor of the Honda Civic after the conclusion
18 of the shootout on Laurel and Dexter Street. On the outside of
19 the gloves is the red blood stains -- red-brown stains that
00:33 20 turn out to be the blood of MIT Police Officer Sean Collier.
21 That is not at issue. That will not be challenged at trial.
22 The DNA analyst will testify that that is indeed Officer
23 Collier's blood, and we do not intend to challenge that in any
24 way.

25 The gravamen of the motion is what is found on the

1 inside of the gloves, and it is different as to different
2 gloves. In the left glove there is DNA of two profiles. The
3 major profile is Tamerlan Tsarnaev, of course Jahar Tsarnaev's
4 older brother. There's a minor profile that is inconclusive as
5 to Jahar Tsarnaev, in our view, that does not come in. There's
6 no possible way to exclude it.

7 If indeed the Court or the government were going to
8 press it, I believe we would try to call an expert at an
9 *Daubert* hearing to say that, in fact, he should be excluded as
00:34 10 a source, a potential source, of the minor profile on the
11 glove.

12 As to the right glove, it becomes a little more
13 complicated because there are at least three contributors to
14 the DNA that is on the inside of the glove, and there's no
15 major profile or minor profile. This is a mixture of DNA
16 profiles that is found inside of the glove.

17 The analyst, shortly after the events at issue, did
18 the DNA on it, concluded that neither Jahar Tsarnaev or
19 Tamerlan Tsarnaev could be excluded; in other words, they could
00:35 20 be included as possible donors of the DNA. What she did not do
21 at that point was give any kind of statistical analysis. We
22 believe, and continue to believe, that any kind of DNA
23 conclusion has to be supported by some kind of statistical
24 analysis or it becomes meaningless and, in fact, inadmissible
25 because there's no way for the jury to properly evaluate it

1 other than to say that they could have been potential
2 contributors; that there's no statistical analysis of how
3 likely they are as opposed to anyone else in the world.

4 So that is where things stood at the beginning of
5 September and actually into October. As part of our expert
6 disclosure in October, we flagged the issue, and specifically
7 in proffering our expert on DNA, flagged that particular issue,
8 that he would get up there and testify that scientifically it's
9 unsound criminalistics -- it's unsound to put forth a
00:36 10 conclusion without any kind of statistical evidence.

11 The government sat on that, did nothing at that point
12 at all. *Daubert* motions were set. The deadline set by this
13 Court was at the beginning of December. I believe it was
14 December 5th. Again, we filed a motion to exclude,
15 particularly those conclusions; again, not the fact that there
16 was blood by Officer Collier but what was in the interior of
17 the gloves. And that was based on the fact that it was
18 inadmissible because there was no kind of statistical analysis;
19 therefore, the government at Jahar Tsarnaev's trial could not
00:36 20 introduce this as some kind of evidence that was probative of
21 really anything.

22 In the response, the government came back, having
23 hired a wholly new expert in statistical analysis of DNA
24 results that had been received by the -- by and forwarded to
25 the Massachusetts State Police, in other words, a statistical

1 analyst did what the Massachusetts State Police did not do.

2 The difficulty with this is it was now December 22nd.
3 As the Court knows, we were all in full -- running on all
4 cylinders getting ready for trial. We filed a reply motion
5 arguing essentially that it was too late at that point for the
6 government to proffer yet another expert, and a particularly
7 thorny kind of expert in a very high octane field of
8 statistical analysis, and that it was really impossible for us
9 to prepare for that kind of expert at the late date that the
00:37 10 government did given that they declined to go forward for the
11 couple of months that they had knowledge that this was going to
12 be an issue there. So that's where we stood at the end of
13 December.

14 So our argument right now is that it's too late for
15 the government to inject a new expert into this particular
16 issue. And even if it weren't too late, it is a little bit --
17 under 403 analysis, it's -- it's not something that the Court
18 should do. What the government is really trying to get across
19 here is that there is some kind of link between the Honda Civic
00:38 20 and Jahar Tsarnaev and Tamerlan Tsarnaev and Watertown to the
21 shooting of Officer Collier.

22 They got that. That -- the fact that Officer
23 Collier's blood is on the gloves that's inside there, there's
24 simply not going to be any kind of challenge. As the Court is
25 going to hear fairly quickly on, there will not be any

1 challenge that Mr. Tsarnaev, Jahar Tsarnaev, was at the scene
2 and was present at the shooting of Officer Collier.

3 So once you get to that point where there's not going
4 to be any kind of challenge, all the government really needs to
5 do is match up people on Laurel and Dexter Street in Watertown
6 with the people that were up in -- at the MIT campus when
7 Officer Collier was shot. They've done that. They get that
8 with the unchallenged evidence that we've given them.

9 It then becomes really confusing and a waste of time
00:39 10 and very prejudicial to Mr. Tsarnaev to go beyond that. It
11 becomes confusing because the government is going to -- or the
12 government will put on a statistical expert -- it will be very,
13 very high-level kinds of testimony that is there. If the Court
14 were inclined to do that, we would have to put up a statistical
15 analyst ourselves. There would probably be -- we would contend
16 there would need to be a *Daubert* hearing as to the statistics
17 before either of them got up there. And at the end of the day
18 it's going to be an exceedingly minor matter that matters not
19 to the government about proving the essential point that they
00:40 20 want to prove, which is that these two men here in Watertown
21 were the ones that were at MIT.

22 And it becomes pretty prejudicial because of the fact
23 that there are both Jahar Tsarnaev's DNA and Tamerlan
24 Tsarnaev's DNA. Not the fact that they are both there, but the
25 fact that their profiles can potentially match what is there.

1 The jury is very likely to take that in kind of the wrong way,
2 that perhaps they both wore the glove at the time that this
3 happened or that either one of them could and that's
4 some -- that's close enough.

5 But that's not what the statistics, of course, are
6 going to mean. It just means that either one of
7 them -- there's no ability in this context to do any kind of
8 relative culpability about who actually wore it on one
9 occasion, who wore it more. There's a slight statistical
00:41 10 probability that it's more likely that Tamerlan had the glove
11 and it's more likely him that wore it at some point than maybe
12 Jahar Tsarnaev, but even that gets very confusing to the jury.
13 If we get into that kind of fight, the jury is likely to use it
14 in a way that is very impermissible.

15 So it really does very little to prove anything that's
16 going to be at issue in this case. It's going to become very
17 confusing. At a minimum, we're going to waste a morning trying
18 to go through statistical analysis and teaching the jury some
19 very complicated concepts about how statistical analysis works.

00:41 20 A better course, and I think the only course for the
21 Court given that it was late disclosed and given that it
22 violates 403, is to simply to exclude it at this point. Let
23 the government talk about Sean Collier's blood but no more.

24 MR. WEINREB: Your Honor, listening to that argument,
25 it didn't sound like much of a *Daubert* argument to me at all.

1 It's mainly an argument to exclude evidence on grounds of when
2 it was produced and then on 403 grounds. But let me start from
3 the beginning.

4 So there are two gloves here, a right glove and a left
5 glove, as Mr. Watkins says.

6 THE COURT: I don't know whether this matters but are
7 they a pair? Are they a matched pair or are they odd gloves?

8 MR. WEINREB: They are a pair. The only reason that
9 it matters that one is a left glove and one's a right glove is
00:42 10 that it enables us to talk about them separately and keep track
11 of which is which.

12 So I would object to anything being argued about the
13 left glove here. Nothing in his motion -- in Mr. Tsarnaev's
14 motion mentions the left glove. If you look at the conclusion
15 of his motion it says, "Based on the foregoing, the defense
16 moves the Court to exclude testimony and evidence that the
17 defendant was a potential contributor to the DNA extracted from
18 the inside of the right glove recovered from the car." And you
19 will search in vain in their motion of any mention of the left
00:42 20 glove. That's all new here.

21 What the defense informed the government in a letter
22 at one point is that if our expert testifies that the defendant
23 cannot be excluded as a contributor of evidence from the left
24 glove, they will want to put on an expert to say that he should
25 have been excluded. But that's not a *Daubert* challenge; that's

1 just what they're intending to do in their case, rebuttal
2 evidence, meeting the government's evidence. So I think any
3 reference to the left glove in this argument is a red herring.

4 Now let's turn to the right glove. So as Mr. Watkins
5 concedes, it had Sean Collier's blood on the outside of it. On
6 the inside of it was DNA matching two individuals. When you
7 find DNA inside -- when you find DNA on something and it comes
8 from only one person, then the statistical analysis is very
9 straightforward. If you find DNA that's a mixture of two
00:43 10 people, the DNA analysis becomes more complicated. That's
11 because unless you have a lot of DNA from one person and only a
12 little from another person, it can be difficult to tell just by
13 looking at the -- visually looking at the results of the DNA
14 analysis which profile belongs to one person and which profile
15 belongs to another. If there's roughly equal amounts of DNA
16 from both people, then you have to use statistics, you have to
17 use math to calculate what the likely profiles are.

18 So the state lab, which is who initially examined the
19 gloves, just like virtually every other lab in the country
00:44 20 doesn't do that more complicated analysis. I think they're all
21 on the verge of doing it, but they don't yet. However, there
22 are other companies that do. And it's called -- the method
23 that has been created by one company, Cybergenetics, called the
24 TrueAllele method, which is a way of doing it.

25 The math is not that complicated once you understand

1 it. This is a scientifically validated method. It's been
2 validated in any number of studies. It's a well-understood
3 method. It is a -- it's really a method no different from the
4 method used where you just have one person's DNA, it's just a
5 little more complicated.

6 The defense filed a motion on December 5th saying
7 that -- arguing that there was a need for a *Daubert* challenge
8 because it would be wrong for Jennifer Montgomery, the state's
9 expert, to testify that Jahar Tsarnaev was a potential
00:45 10 contributor of DNA to the inside of the glove if she could not
11 give a statistical likelihood of that.

12 So the government went up and got the statistical
13 likelihood. And two weeks later, which is the time for
14 responding to motions, we filed our opposition. We had already
15 served on the defense the results of the TrueAllele analysis,
16 and we filed our motion saying now we have the statistic, so
17 now there's no more need for a *Daubert* hearing.

18 I'm not really sure I'm hearing the defense say there
19 is a need for a *Daubert* hearing. I would certainly be willing
00:46 20 to have one if they question the statistical method, but the
21 Court need not have one if it's clear that it's a reliable
22 method. And I think if the Court looks at our opposition, it
23 will be satisfied that it is clear that this is a reliable
24 method and there's no need for a *Daubert* hearing.

25 So really what the defense argument boils down to is

1 that the government's doing this was untimely. But it was done
2 back in December, and they had -- by mid December they had the
3 results. It's now the beginning of March. They've had plenty
4 of time if they want to show these statistical results to their
5 expert. It's not like somebody would need to do experiments to
6 be able to assess this. It's just math. You just have to --

7 THE COURT: So let me understand. You're not
8 proposing -- in light of everything that's happened, including
9 your reply, you're not proposing to offer it without the
00:47 10 statistical evidence?

11 MR. WEINREB: No, no, we are proposing -- so now we
12 have --

13 THE COURT: That might be a *Daubert* question?

14 MR. WEINREB: No, I would concede for purposes of this
15 argument that if we didn't have a statistic, it shouldn't come
16 in. But now we have a statistic.

17 The defense's 403 argument, to the extent I understood
18 it, which I'm not sure I did, has no merit. The defense argues
19 that there's no -- there's nothing probative about us
00:47 20 demonstrating that Jahar Tsarnaev's DNA was likely inside that
21 glove. I think that -- just to state that argument is to
22 refute it. Obviously it's probative that the gloves that have
23 Sean Collier's blood on them on the outside are -- if the
24 defendant's DNA is on the inside --

25 THE COURT: Well, is there any way of determining when

1 either any sample of DNA is deposited? It could have been a
2 week before?

3 MR. WEINREB: That's true. But that's a matter for
4 cross-examination. That's often the case in any case.

5 THE COURT: No, but doesn't the inability to answer
6 that question reduce significantly the probative value?

7 MR. WEINREB: Well, it wasn't -- it doesn't make it
8 a -- you know, proof beyond a reasonable doubt but, you know, a
9 brick is not a wall. This is just one piece of evidence. It's
00:48 10 an indication that the gloves were worn by the defendant and by
11 the -- by his brother at some point. Maybe they weren't worn
12 that night. That's an easy enough question to ask the expert.
13 Can you say when that DNA got on there? Couldn't it have
14 gotten on there a week earlier? A month earlier? So you don't
15 know that those gloves were worn by either of these individuals
16 that night, do you? No. But, I mean, it's probative the fact
17 that their DNA is inside of them and not somebody -- entirely
18 third person's DNA, for example. These aren't difficult
19 concepts for a jury to understand.

00:49 20 At one point Mr. Watkins said there is a much greater
21 likelihood of Tamerlan Tsarnaev's DNA being in the gloves than
22 Jahar Tsarnaev's. That I think is a misunderstanding on his
23 part of the statistics that are cited here. It's true that the
24 likelihood of selecting from the population at random somebody
25 with the profile that was found in these gloves is -- it's only

1 45,000 for the Caucasian population for Jahar Tsarnaev and it's
2 155,000 for Tamerlan Tsarnaev, but that has nothing to do with
3 the likelihood of whose DNA is in the gloves; it just has to do
4 with how common each of their DNA profiles is in the
5 population.

6 I'd also say that this 403 argument is being made for
7 the first time -- literally the first time right here in this
8 courtroom out of Mr. Watkins' mouth. Nothing has been filed on
9 this. So I could -- it may be that, you know, the government
00:50 10 could cite case law to you about DNA, about cases where you
11 can't prove exactly when the DNA got there that would be useful
12 to the Court. I haven't had an opportunity to do that because
13 they never moved to exclude the information on this ground.

14 This is a *Daubert* motion. This was supposed to be an
15 argument about a *Daubert* hearing, now we're hearing something
16 completely different. This argument could be made, who knows
17 when Officer Collier's blood got on the gloves? Who knows when
18 any DNA gets on anywhere? That's always an issue with DNA.

19 THE COURT: The only urgency to this is if you wanted
00:51 20 to talk about it in your opening.

21 MR. WEINREB: Yes. So we do want to say that the -- I
22 mean, the murder of Officer Collier is different from the
23 marathon bombings. There is surveillance video of two people
24 walking up to Officer Collier's car and running away, but the
25 video is taken from so far away that you can't see who they

1 are. And so this is a circumstantial case to some degree when
2 it comes to proving the defendant and his brother guilty of
3 that murder.

4 The defendant could have -- Tamerlan Tsarnaev could
5 have been there with another person. It doesn't necessarily --
6 you know, even assuming one of those two people is one of the
7 Tsarnaevs, it doesn't mean the other one was. So we need to
8 prove that they killed him. And we intend to prove it in a few
9 ways. One is that the gun used to kill him is the same gun
00:52 10 that was used in the shootout in Watertown. But another very
11 important way, maybe the most important evidence, is that
12 Officer Collier's blood is on this pair of gloves that is found
13 in the car and both brothers' DNA is found in those gloves.

14 To the extent the defense wants to make the point that
15 that doesn't mean that either one of them in particular, let
16 alone both of them, was wearing the gloves that night, that's
17 easy enough to make during cross-examination. That's easy
18 enough of an argument to make to the jury. But the government
19 has the burden of proof here.

00:52 20 And the defense keeps saying, as they said this
21 morning, everything -- nothing is in dispute. Everything's,
22 you know, pretty much agreed to. So the government -- what
23 they seem to take from that is -- or what they seem to think
24 flows from that is the government doesn't have the right to put
25 in any evidence that the defense thinks, you know, might have,

1 you know, an extremely strong impact on the jury. But that's
2 not the law.

3 The jury isn't going to take its job as being just to
4 decide the few things that the defense decides to contest and
5 not the others. They're going to be instructed that we have to
6 prove each and every element of every crime beyond a reasonable
7 doubt. And identity is an element of every crime. We're
8 entitled to our best evidence. This is good evidence. And the
9 defense has not made any kind of compelling argument why we
00:53 10 shouldn't be able to use it. And I don't think they should be
11 permitted to make the argument without giving us the slightest
12 notice that it was coming down the pike.

13 THE COURT: All right.

14 MR. WATKINS: Just two brief -- very brief points,
15 perhaps. As I understand the government, they would agree that
16 this is inadmissible as to the right glove if indeed the Court
17 rules that they're too late on the statistical analysis and it
18 can't come in. The government often reminds us in pleadings
19 ever more strident strike that deadlines have consequences.
00:53 20 This is a case where there was a deadline by the Court. The
21 government knew we were raising this issue. They waited till
22 the eve of trial.

23 While it is technically true that between December
24 22nd and now we could have gone into a whole other expert, the
25 Court knows how hard, not just the defense, all of the parties

1 are working here. It's the wrong time to bring this forward.

2 As far as the 403 argument, I think Mr. Weinreb forgot
3 about the reply where we did argue from pages 4 to 8 of the
4 defendant's reply exactly the arguments that are made today.
5 To the extent he's saying somehow he's surprised about that,
6 that's simply wrong. We argued 403 in there, we'll continue to
7 argue it.

8 In regard to the left glove, if the government indeed
9 is trying to put in an inclusive result as to Mr. Tsarnaev,
00:54 10 that's a relevance problem. I don't understand how that comes
11 in at all, *Daubert* or beyond. If there's some kind of
12 scientific basis or legal basis for putting in an inconclusive
13 result as to Mr. Tsarnaev, I think we will need a hearing
14 before the government tries to put that kind of evidence in at
15 trial because that's going to be a mistrial when the expert
16 testifies to that and the Court has to strike it.

17 THE COURT: Why don't you remain standing and address,
18 if you're the one, the polymer motion.

19 MR. WATKINS: The polymer is somewhat similar but it
00:55 20 presents different kinds of issues. I may -- I put this motion
21 under a somewhat broad heading because it encompasses different
22 kinds of evidence, but at the core they are all much the same.
23 What the government seeks to do here is to take detritus from
24 Boylston Street polymers -- caulking, for want of a better
25 word, from -- that was found at the marathon bombing site,

1 also, pieces of tape, clear tape, gray tape and black tape, and
2 match those in some fashion to the items that were found in the
3 home at 410 Norfolk.

4 But these are not -- these are not -- unlike DNA,
5 these are not anything you could call a conclusive match. As
6 the government's expert is going to admit, it's what they're
7 calling a Level 3 association; in other words, they can't say
8 for sure that it is this roll or this caulking that was found
9 inside of this -- that was found on Boylston Street, but
00:56 10 rather, it matches something that is similar to that or
11 manufactured in some kind of a similar way.

12 So even on the government's theory taking it in, you
13 know, the light most favorable to it, a Level 3 association
14 tells the jury almost nothing. Unlike the DNA context, there
15 is no statistical analysis that could be done about how likely
16 it is that it is this roll or how likely it is this
17 manufacturing of any of that stuff. There's simply no clear
18 standards by which an analyst can conclude that these two
19 things are similar enough that one can conclude that they're
00:57 20 somehow a match.

21 The only times this -- well, the vast majority of
22 times that the government cites in its brief are when there are
23 much more definite matches, when, for example, the end of a
24 tape in connection with all of the other chemical properties of
25 it can be matched up. Those are the kinds of cases where

1 courts are inclined to allow this kind of evidence in. But
2 here that's not what they're trying to do; they're simply
3 trying to say it's pretty much like the stuff that was found at
4 410 Norfolk.

5 And that is where the main issue is. Even if they
6 were going to be allowed to do that, there are serious
7 questions. And we've gone into it in some detail in the
8 briefs. I don't want to hit every point. But there are still
9 significant questions about whether they can even say that,
00:58 10 whether on a scientific basis as to the polymers and to the
11 tapes, that they can say that their tests are conclusive. Even
12 on that level to say it's scientifically or chemically
13 consistent with what was found at 410 Norfolk. And
14 that -- that, again, is something that can only be resolved at
15 a *Daubert* hearing if the Court were inclined to let the
16 government have it in.

17 But again, much like the DNA issue, the question is
18 what is the probative value. The government is going to put
19 into evidence items that were found at 410 Norfolk Street.
00:59 20 They're going to put in rolls of clear tape, rolls of silver
21 tape, rolls of black tape. They are going to put in caulking
22 that they found, a caulking gun.

23 Again, it's difficult to see that there's going to be
24 any kind of relevance basis to exclude that there, so they're
25 going to get, to the extent that they need it, some kind of

1 corroboration there. To then add some kind of scientific
2 patina on all of it is simply unwarranted. It's particularly
3 unwarranted where the science does not conclude what it is that
4 the government seeks to argue at the end of the day: that they
5 made this -- that these items here were used to build these
6 pressure cooker bombs. It simply does not support that kind of
7 conclusion. There's a grave danger that the jury's going to
8 misuse it as such and conclude that, in fact, those were the
9 rolls that were used to build the bombs.

01:00 10 Given all that, it simply should not come in. It
11 should not be allowed to be used in a very prejudicial way that
12 is not supported by science.

13 MR. CHAKRAVARTY: Your Honor, again, the issue of
14 *Daubert* reliability versus 403 or the probative value of the
15 testimony appears to be conflated here. And, in fact, the type
16 of source-specific matching of the polymer evidence has been
17 the only circumstance in which *Daubert* has really been an issue
18 throughout the case law. And of course, as the government says
19 in its pleadings, source-specific matching was not done in this
01:00 20 case.

21 To the contrary, the analysts reviewed the
22 characteristics of the polymers found, particularly tapes and
23 sealants, both at the Boylston Street detritus, as Mr. Watkins
24 calls it, as well as 410 Norfolk Street, and determined using a
25 series of objective and widely accepted criteria, both in the

1 industry -- the polymer adhesives' industry as well as in
2 forensic science, in order to determine the class
3 characteristics. And so short -- this is not the circumstance
4 that could be unfairly prejudicial where an analyst says that
5 this particular piece of tape was taken off of this particular
6 roll in the defendant's residence. Instead, that witness is
7 going to say, I have examined this tape. This is -- it's more
8 than just a visual inspection. I've run this series of tests
9 on this tape. These are the tests that are used in the
01:01 10 industry and in forensic science in order to determine what the
11 class characteristics are of the tape. And I identified that
12 the class characteristics of the tapes and the polymers that
13 were found in -- at defendant's residence were consistent with
14 those same characteristics.

15 It does not mean -- the "consistent with" language
16 notwithstanding, it does not mean that the expert is going to
17 say that the tape was from 410 Norfolk Street. That would be
18 something abundantly clear, as Mr. Watkins has already
19 indicated, it's a Level 3 association at best. And what that
01:02 20 means is the fact that the tape could not be excluded -- first,
21 it's a natural question by the jurors. You're going to see
22 duct tape found in the street, you're going to see duct tape
23 seized in the residence. They're going to wonder: Is this the
24 same duct tape? The government has the right to say we did an
25 analysis to determine that. We found they are both of the same

1 class characteristics but we could not make a stronger
2 conclusion than that. It's that kind of candor which
3 demonstrates this is not prejudicial testimony; however, it's
4 another -- as Mr. Weinreb says, it's another brick in the wall.

5 But it also emphasizes that this goes to the weight of
6 this evidence, not the admissibility. The government is not
7 going to argue simply from that type of correlation, those
8 class characteristics, that this evidence means that the
9 defendant made the pressure cooker bombs; rather, it's going to
01:03 10 say that items in the household in which he had resided were
11 consistent with the items -- with some of the construction
12 materials of the device itself.

13 The government has to explain what these devices were
14 to the jury because that's going to be -- it's not just
15 curiosity, it's the very mechanism of the crimes. And so it's
16 important evidence for the jury -- for the government to
17 introduce. It goes to weight, not admissibility, and there's
18 no prejudice coming from the fact that tape is tape. That's
19 essentially what the witness is going to be saying. And
01:03 20 they're going to say of the varieties of tape, some of the
21 samples are consistent with some of the samples that were found
22 on the street.

23 A final point: The government has -- you know, this
24 testimony, if it's going to come in, it's going to come in
25 weeks into trial. To the extent that the testimony is

1 necessary, given what the lay of the land is at the time that
2 the witnesses are expected to testify, it's possible that the
3 government doesn't even elicit the evidence. But to say under
4 *Daubert* grounds or 403 grounds that testimony about actual
5 physical evidence found at the scene that is consistent with
6 and could give rise to an inference that people in Norfolk
7 Street constructed the devices I think is an important one that
8 the government should be allowed to make.

9 THE COURT: All right. This motion is denied for the
01:04 10 simple reason that the government, as I hear it, doesn't
11 propose to offer the possible testimony that might implicate a
12 *Daubert* question. The "consistent with" is different from the
13 source specific, and I think the "consistent with" is really --
14 I think it's really a relevance issue and not a *Daubert* issue
15 at all. So anyway, that motion is denied.

16 MR. WATKINS: Just for the record, I raised *Daubert*
17 issues there that, in fact, there are no standards by which
18 even a Level 3 association could be made that there are
19 not -- that that's not a scientifically supportable ground. So
01:05 20 I think at a minimum, even if the Court under 403 purposes is
21 going to allow it, you would still need to have a hearing in
22 order to admit it at trial.

23 THE COURT: I don't think so.

24 Now, let's talk about foreign witnesses. Let's start
25 with the deposition issue, defendant's motion for foreign

1 deposition.

2 MR. FICK: Yes, your Honor. So this is the request
3 that -- to authorize the deposition and to order the government
4 to take steps to make the witness available, among them Magomed
5 Kartashov, who is a maternal cousin, probably is the best
6 source of evidence about Tamerlan Tsarnaev's radicalization,
7 his state of mind and what he was interested in and obsessed
8 with at the time that he traveled to Russia in 2012.

9 Mr. Kartashov is not available to come to testify here
01:06 10 because he's in jail in Russia. The government, however,
11 procured his presence for an interview with the FBI on a prior
12 occasion by a request of the Russian government. So in that
13 sense, the government has the ability to at least solicit his
14 presence. And we'd request that they do that again for
15 purposes of a deposition, or at this point given the time,
16 alternatively, if arrangements for a video connection were
17 possible, of course that would be an alternative means of
18 procuring his testimony.

19 The essential argument the government makes in
01:06 20 response is, Well, the Court can't order the government to
21 exercise the government's prerogatives under our Mutual Legal
22 Assistance Treaty. First, it's not entirely clear the Mutual
23 Legal Assistance Treaty effected the means by which way they
24 procured his presence for the FBI in the first instance, and
25 really, the cases that -- we have reached this conclusion

1 previously simply to say that the Legal Assistance Treaty
2 itself does not create a right for other parties to act, but
3 that sort of conflates the means with the right. The defendant
4 is arguing here that the right in here is in the Sixth
5 Amendment to the Constitution, and the Legal Assistance Treaty
6 is simply means by which the government not only can but has
7 procured access to the witness.

8 The most relevant First Circuit case which I think
9 actually, given the way the timing of this unfolded, was cited
01:07 10 in connection with a different motion, not this one, but the
11 case is *Filippi*, 918 F.2d. 244. That case held that the
12 failure of the government to assist in obtaining parole for
13 foreign witnesses through executive means was a Sixth Amendment
14 violation, and I think by analogy that tells the Court that
15 there is a basis to say to the extent the government has de
16 facto access to a witness, it should be required at least to
17 make efforts to exercise that ability of access. And so that
18 essentially is the basis of the motion.

19 Now, the government also in its response says, Well,
01:08 20 there's other evidence of Tamerlan Tsarnaev's radicalization.
21 There are, for example, voice recordings of Mr. Tsarnaev on his
22 computer, et cetera. That of course is wonderful. If the
23 government is willing to stipulate that Tamerlan Tsarnaev's
24 voice is, in fact, Tamerlan Tsarnaev's voice, that would be
25 helpful. But again, the government has made this argument over

1 and over again, the parties ought to be able to put their best
2 evidence in, and the best evidence of Tamerlan Tsarnaev's
3 radicalization is testimony that Magomed Kartashov could
4 provide.

5 THE COURT: Do you have any current information about
6 it?

7 MR. FICK: As far as we know, he is still serving his
8 sentence in the -- sort of a prison colony. It's not really a
9 facility; it's more like a little town where prisoners live
01:09 10 with their families in Voronezhskaya Oblast, which is in the
11 European part of Russia, you know, a couple of hours south of
12 Moscow.

13 My understanding is that when he was interviewed by
14 the government previously, he was -- I know, I can spell that
15 for the court reporter.

16 (Laughter.)

17 MR. FICK: But my understanding is when the government
18 interviewed him previously, he was brought out of that -- out
19 of wherever he was detained to an office setting where that
01:09 20 meeting took place.

21 THE COURT: And so what specifically would you suggest
22 if it's not the MLAT Treaty that the government might do?

23 MR. FICK: Well, I'm not privy to what mechanisms,
24 either formal or informal, that the government may have to
25 solicit cooperation from Russia in a law enforcement effort.

1 You know, if there's something other than the MLAT Treaty,
2 something less formal that they used before, presumably they
3 can use it again.

4 And I'd also note, going back to the agreement that I
5 cited, you know, the case law about the MLAT Treaty simply says
6 there's no right of action for the third party under the MLAT
7 Treaty, but again, they're saying the right of action is the
8 Constitution. The MLAT Treaty is the mechanism the government
9 has in its hands much like the parole process to bring
01:10 10 witnesses in. That was at issue in Filippi.

11 MR. CHAKRAVARTY: Your Honor, I inquired with the FBI
12 as to what other options there might be aside from an MLAT, and
13 they inquired with the foreign government, and they said
14 that -- and this is months ago now -- that there will be no
15 cooperation with any request, whether it be from the FBI or
16 from the U.S. government at large, without a request
17 from -- through the Mutual Legal Assistance Treaty. So
18 whatever vehicle was used back in the summer of 2013 is not
19 even a possibility even if we wanted it to be a possibility
01:10 20 which -- but that's jumping ahead a little bit.

21 Because in assessing this request for a deposition, or
22 even Mr. Kartashov as a witness, we first have to address the
23 threshold issue of what is the relevance of the witness. And
24 at best, unless, you know, there's information that the defense
25 has that we don't and that we haven't provided to them, he

1 offers testimony about Tamerlan Tsarnaev before the conspiracy
2 charged in the case had even begun, what Tamerlan Tsarnaev did
3 in 2012 before the plot that was -- that resulted in the
4 bombing of the marathon.

5 And it's an important distinction because everything
6 that flows from the defense request, talking about how critical
7 of a witness he is, suggests that to the extent that he has any
8 value in a mitigation case, it would come to not talking about
9 the defendant's individualized liability, or even his relative
01:11 10 culpability versus his brother's, but rather, simply character
11 evidence or the evolution of Tamerlan Tsarnaev's own thoughts.

12 So that prevents fundamentally them from being able to
13 meet the extraordinary threshold of -- required by Rule 17
14 saved for extraordinary cases, especially when witnesses reside
15 in a foreign country where the penalties of perjury and the
16 other accoutrements surrounding reliability of testimony aren't
17 going to be in place, that they have a burden to meet.

18 And I suggest that they haven't met that burden. They
19 haven't proffered a 401 reason or the analog in it for -- in a
01:12 20 death penalty sentencing phase as to why his testimony is
21 necessary. Having not met that burden, they then can't further
22 justify this extraordinary step.

23 The case law is clear that even though this -- this
24 unique circumstance has not been squarely addressed by the
25 First Circuit or by the Supreme Court, those cases that have

1 reviewed the ability for individuals to access the right of an
2 MLAT have routinely been denied that access, and that's for
3 good reason. The MLAT is designed for state-to-state
4 interactions and cannot be co-opted by the interest of a few
5 even when weighed against the Fifth and Sixth Amendment rights
6 that a criminal defendant is afforded.

7 The defense also appears, I should add, in their
8 papers -- and based on Mr. Fick's knowledge of the situation --
9 has more and closer access to being able to even talk to
01:13 10 Mr. Kartashov than the government does. If he is in a facility
11 run by the federal government in Russia, then not only can
12 we -- are we unable to even ascertain that definitively from
13 the government, but we certainly don't have access to
14 communicate with him.

15 He hasn't indicated that he would be willing to go
16 through this procedure, and what we're talking about is
17 essentially a detour from focusing on the case, a pragmatic
18 problem of both expense as well as having to go over to Russia
19 to try to attempt to knock on a door and say, Hey, we want to
01:14 20 talk to one of your prisoners for a little while, and then
21 hopefully getting some kind of reliable testimony that this
22 jury is going to be able to assess within the context of
23 everything else in the mitigation case, your Honor.

24 It's just -- not only have they not met the legal
25 threshold, it just doesn't make sense pragmatically. And so

1 the government would ask that the motion be denied.

2 MR. FICK: Very briefly, your Honor, I'm frankly sort
3 of dumbfounded to hear the government try to suggest
4 Mr. Kartashov would not be relevant not only for the mitigation
5 case, but given the way the government has described the way
6 it's going to frame the motive in the guilt phase of the case,
7 frankly, the testimony could be relevant there. The government
8 essentially has said -- indicated to us that it's going to
9 argue that Jahar Tsarnaev was self-radicalized, whatever that
01:14 10 means.

11 Our answer to that, our belief and the truth of the
12 matter is that, no, that is not the case, that Tamerlan
13 Tsarnaev radicalized his brother and his path to radicalization
14 started much earlier and was much more intense including a trip
15 to the Caucasus for the specific purpose of joining the
16 insurgence. Magomed Kartashov is the living person who can
17 provide the best and strongest corroboration of that evidence,
18 and so for that reason we think his testimony is critically
19 important.

01:15 20 THE COURT: Okay. I'll reserve it.

21 Then there's the motion to delay the identification
22 of -- or the disclosure of foreign witnesses.

23 MR. FICK: Yes. And the original relief sought there
24 was to delay to either seven days before the beginning of the
25 mitigation case -- or before the guilt phase or until such time

1 as the witnesses are on an airplane headed to the United
2 States, and we maintain that request at this time. Or
3 alternatively, I think this is also sought in the motion, a
4 protective order that would bar the government from making
5 efforts through a foreign government to interview the witness
6 overseas given the intimidating circumstances in which that can
7 sometimes happen.

8 I think that the potential for witnesses to be -- who
9 were reluctant to come in the first place is beyond question,
01:16 10 and, you know, for the same types of reasons that this kind of
11 relief was allowed in the Rwanda case, I think it should be
12 permitted here as well.

13 And then a separate piece of the motion, quite apart
14 from the question of when a disclosure or foreign witness
15 identity is made to the government, separately there was a
16 request that a firewall, essentially an Immigration and Customs
17 agent, be designated to work with the defense. I need
18 witnesses who may need to be paroled into the country as
19 opposed to simply receiving ordinary U.S. visitor visas. And
01:16 20 for similar reasons, simply so the government -- the
21 prosecution team is not sort of neck deep in the defense's
22 business, they assume the requirement that they designate an
23 agent in this case would also be appropriate.

24 MR. CHAKRAVARTY: Your Honor, the reason the Court set
25 a disclosure deadline for witnesses is so the parties wouldn't

1 be surprised. We're on the eve of trial. The time has come
2 when we need to know who the witnesses are and what the theory
3 of the case is against which we are going to be presenting
4 evidence. We need to know what questions to ask the witnesses
5 when they're on the stand, we need to know both for the
6 liability phase as well as the penalty phase.

7 The sole justification for the defense's extraordinary
8 request is that they -- the witnesses that they propose are
9 likely to be intimidated. And while intimidation could happen
01:17 10 in a variety of circumstances, there's absolutely zero
11 evidence, at least that the government is aware of, I don't
12 know what may have been filed with the Court, to suggest that
13 that kind of intimidation that they're envisioning, number one,
14 has or will happen; but number two, that it will happen because
15 of disclosure to the government. And what I mean by that is
16 that the foreign government from whence these witnesses are
17 coming are likely to know, regardless of any U.S. government
18 involvement, of the purpose and the nature of why these people
19 are coming to the United States, especially if some kind of
01:18 20 extraordinary permissions are granted for purposes of coming to
21 the United States.

22 The example that they use and is the sole
23 precedential -- I guess it's not even precedential, but the
24 sole example of such extraordinary steps having been taken were
25 in the Rwanda cases. The Rwanda cases -- the case in New

1 Hampshire as well as in Massachusetts -- involved witnesses for
2 both the sides coming over from Rwanda, from a small village in
3 this sub-Saharan country which is considerably different
4 demographically in terms of sophistication from Russia or the
5 Caucasus, Kyrgyzstan and these other places -- and it was a
6 shared witness pool. And the concern the defense had at that
7 point, given a regime that they believed would intimidate their
8 witnesses and in support of that belief they advanced as the
9 primary theory of their defense that the Rwandan government was
01:19 10 going to be manipulating these witnesses.

11 And there was a particular narrative that they wanted
12 to further, and they presented expert testimony in that regard,
13 when it was a core -- at the core of their defense the simple
14 solution that the judge saw in New Hampshire in this case was
15 to say, Well, why do you have to designate? Why don't you just
16 give a list of witnesses to get their travel documents in order
17 and then wall off the prosecutors from knowing who those
18 witnesses are until they hit American soil?

19 That procedure failed miserably. The witnesses were
01:20 20 able to come without a problem but many of them didn't testify
21 at all -- I'm speaking of defense witnesses -- and those that
22 did perjured themselves. And the whole point of knowing who
23 the witnesses are is so that we can learn more about them and
24 we can learn -- we can prepare for them on cross-examination.

25 The Rwandan cases involved illiterate farmers. We

1 have no idea who is coming over from -- in this case, we have
2 no idea for the purposes for which they're coming over, and
3 we're at a considerable disadvantage from not knowing even
4 that. It's one thing to know who a witness is, it's another
5 thing to go out and to try to interview a witness. And it's a
6 third thing to realize the harm which they are considering,
7 which is to contact a foreign government, tell them the nature
8 of the witness, and ask them -- or give them certain facts that
9 would then enable them -- or incentivize them to actually
01:21 10 intimidate the witness to come here. And I could tell you
11 right now the government has no intention to do that.

12 And so it's that worst-case scenario for which the
13 defense has proposed this most restrictive means. And while
14 two months ago that may have been appropriate before we were
15 able -- before we were right engaged in the case and, frankly,
16 we would not have done very much in the last two months, we
17 would have asked the FBI to look into that more, but that's a
18 different question from now when we actually have to present
19 the case and don't know who these witnesses are.

01:21 20 The -- another point about the -- how this procedure
21 would not only prejudice the government but would encourage bad
22 evidence coming in, in the Rwanda cases, the witnesses all
23 testified about a very narrow piece of history in a small
24 village for which the government had thoroughly investigated,
25 and so we had some context as to in what circumstances their

1 testimony might be false and what circumstances we might be
2 able to present contradictory evidence.

3 In this case we don't have that. In this case we have
4 somebody who can come up and say anything they want about the
5 defendant or his family's history, presumably, without the
6 government having any basis to be able to even conduct an
7 investigation to be able to cross-examine. And if they -- to
8 do it -- if they testify themselves, then at least we get a
9 right to cross-examination. But if they just come here to
01:22 10 speak with the defense mitigation experts, and then through
11 hearsay the mitigation experts present that testimony, we are
12 at an even further disadvantage.

13 At the very least, your Honor, we need to know who
14 these people are so we can prepare for their case -- the
15 testimony that's going to arise from them in the case both in
16 the liability phase so that we can anticipate it as well -- and
17 we don't overreach and argue something that we know that
18 they're going to have witnesses on who are going to be
19 eyewitnesses to some event that we're aware of, as well as,
01:23 20 most importantly, in the mitigation phase. And given the fact
21 that we're all going to be fully engaged in trial, we ask for
22 that to be done now.

23 MR. FICK: Very briefly. I think there's a difference
24 between -- what we were doing is we're calling the mitigation
25 witnesses to talk about family history. It's very different

1 from talking about contentious historical facts about the
2 Rwandan genocide. That aside, the risk and the potential of
3 witnesses being afraid and sort of not wanting to come is very
4 real and is palpable.

5 At the beginning of this case, shortly after the
6 marathon bombings, the FBI went over to Russia, and with the
7 help of a Federal Security Service in Russia -- this is the
8 successor agency to the KGB -- people were summoned to
9 essentially meet at the FSS -- or KGB -- headquarters to do an
01:23 10 interview. Over the course of the last 18 months we have made
11 trip after trip, spent hours and hours with these people
12 helping to put them at ease, trying to convince them that it's
13 safe for them to come to the United States, they're unlikely to
14 be harassed further. And to suggest that it would not be
15 intimidating for these same people to get summoned by the
16 Federal Security Service again just before they're about to
17 come here to testify, it's fundamentally unhistorical and
18 preposterous.

19 So at a minimum, again, I think even if the defense
01:24 20 has to give over the names at some point sooner than -- shortly
21 before the beginning of the penalty phase, there ought to be a
22 protective order to prevent the government from communicating
23 the information about their identity or seeking to do anything
24 with regard to interviews abroad.

25 It's not my purpose here to sort of impugn the

1 government or legal system of Russia, but, you know, these are
2 sensitive matters, and for that reason we filed these motions
3 under seal and we would request that they stay under seal
4 because I suspect I, and certainly other members of the defense
5 team are going to continue to have to travel to these places
6 during the course of the trial, and certainly all this
7 discussion being public would not be helpful in that regard.

8 THE COURT: But isn't it the case that some
9 authorities in Russia are necessarily aware of the witnesses
01:25 10 because of visa applications and other exit visas and so on?

11 MR. FICK: There's no requirement for an exit visa
12 from Russia anymore for the last couple of decades. People
13 apply for a foreign travel passport, which is a standard thing,
14 through a local administrative office. And then the travel
15 documents that are necessary are travel documents -- are U.S.
16 travel documents, either a visa from the United States Embassy
17 or a parole letter from Immigration and Customs Enforcement.

18 You know, while this case has certain political
19 sensitivity in Russia, particularly when attention is drawn to
01:25 20 it either by the presence of law enforcement or the defense in
21 various places -- on the other hand, simply the travel of
22 people in and out of the country is not something that's
23 necessarily going to attract that level of attention. There's
24 no reason to think that a request by the FBI to interview
25 somebody is going to be treated the same as someone who is

1 simply getting a passport or getting a travel document to come
2 to the United States. There may be an inference about why the
3 person is coming or something, but the sort of pointed request
4 of U.S. law enforcement to go talk to those people, there's no
5 reason to think that something like that should happen and they
6 would be intimidated. It's really a very different kind of
7 thing.

8 MR. CHAKRAVARTY: Your Honor, there's one point I
9 didn't raise -- well, I didn't respond to, which is the issue
01:26 10 of the parole. The government's, obviously, argument was about
11 the fact we need to know the witnesses, but we also lay out in
12 our opposition that some of these witnesses may need government
13 permission to come in outside of the, you know, green card,
14 citizenship or visa process. Those processes are incumbent
15 upon themselves -- on the witnesses, or with the assistance of
16 the defense team to go through the regular procedures in order
17 to obtain those. But some of these witnesses may not be
18 eligible, and we explained, as occurred in the Rwanda cases,
19 and the Defender's office knows, that the process to apply for
01:27 20 administrative parole is a very different process and requires
21 a lot more lead time. And there is -- because administrative
22 parole is permission for a very limited, narrow purpose in
23 order to come to the United States, there are often -- or there
24 is a security plan that has to be proposed in place at the time
25 that one of these people comes in.

1 In some cases that security plan could mean
2 incarceration, as occurred in some of the -- in the instance of
3 some of the Rwandans, in some cases that could mean an
4 electronic bracelet, and others it could mean there has to be
5 24-hour surveillance or some other kind of a very
6 resource-intensive security procedures which the investigative
7 agency responsible for the case has to do.

8 In this case the FBI is that investigative agency. So
9 procedurally, and I don't know how many, if any, of the
01:28 10 witnesses -- proposed witnesses would have to go through that
11 procedure, but their names, some information about their
12 background, both for vetting for security clearance purposes
13 but more importantly for -- to ensure that there is an adequate
14 security plan. I mean, if these are known terrorists from
15 Russia -- I'm not proposing that they are, but if they were --
16 the security plan would be a much different one, much more
17 restrictive, than there would be if they were permitted to come
18 at all, it would be very different if it's a family member who
19 doesn't pose that kind of a physical risk.

01:28 20 But in addition to the physical risk assessment and
21 requirements, then there are also waivers and other procedures
22 that have to be in place so that these people won't come to the
23 United States and claim asylum or some other relief from
24 persecution, for example, or other events.

25 All of that takes a lot of time and requires more than

1 just the investigative agency, the FBI. They, once they have
2 an adequate security plan, then have to petition to the
3 Department of Homeland Security, which hopefully on Friday will
4 still be operating, so then Homeland Security has to both
5 approve that plan and then issue the appropriate paperwork.
6 That paperwork then goes over. And that's notwithstanding
7 whether there's any watch list or anything else that might be
8 preventing them from travel. So that's an elaborate process.

9 I explain that all for your Honor's benefit but also
01:29 10 to make the record that the government has made known to the
11 defense that they need to provide that information to the
12 FBI -- and we gave them the names and numbers of the FBI
13 personnel who happened to be the supervisors of the case -- and
14 we haven't received any information. And the inability for
15 those people to travel is not the responsibility of the
16 government if the defense has, in the interest of protecting
17 the secrecy of their witnesses, has chosen strategically not to
18 provide that information. If they plan to do it now, then they
19 have to recognize that the FBI will do what they can to try to
01:30 20 process that paperwork, and we will as well. And we'll crack
21 the whip as much as we can. But given the passage of time, and
22 I don't know when these witnesses would be expected to testify,
23 but it could very well be that they may not be here on time.
24 And that burden cannot fall on the government when we've made
25 it clear to the defense as to what the process is and they just

1 simply haven't availed it.

2 I just finally conclude just as a caveat that I don't
3 know how many, if any, of the proposed witnesses will fall into
4 this category, but to the extent that any do, those are the
5 witnesses who both have to file -- they have to provide
6 information for -- to the government, and those are the
7 witnesses who, in the New Hampshire case, were walled off from
8 a so-called tainted ICE agent. That could not be the process
9 here because there are two different investigative agencies
01:30 10 involved, and each of them would have to have their own filter
11 procedures. But for the reasons I said earlier, at this point
12 there's no more need for that wall. We need to know who they
13 are.

14 MR. FICK: Very quickly, I think Mr. Chakravarty
15 conflated a couple of different issues here. Bottom line:
16 Immigration and Customs Enforcement controls the border. Any
17 issues that Mr. Chakravarty has talked about are precisely the
18 kind of thing that a fire-walled ICE agent could handle in the
19 first instance, and then bring to the attention of the
01:31 20 investigative agency or the Court if necessary.

21 While there certainly is the possibility that the FBI
22 could be the requesting party to immigration, to bring somebody
23 into the country, that is certainly not the exclusive
24 mechanism. As Ms. Conrad utilized in the Almohandis Saudi
25 firecracker case, for lack of a better description, the Court

1 also has the ability to request public interest parole to
2 immigration directly. The bottom line is whatever issues may
3 arise to be vetted by a fire-walled agent in the first instance
4 will protect all parties' rights and make the process more
5 efficient.

6 THE COURT: I'll reserve it.

7 I think that's my list. Anybody else have anything?

8 MR. MELLIN: Your Honor, one issue that came up today,
9 we had brought up a few of the victim witnesses to consider the
01:32 10 layout of the courtroom, and there are really two issues that
11 came up. The first is that a few of the victims are very
12 concerned by the presence of the defendant so close to them and
13 the proximity of the defendant to them while they're
14 testifying.

15 As the Court knows, as we look at the court right now,
16 the witness stand is probably five to eight to maybe ten feet
17 from where the defendant will be sitting. When the witnesses
18 walk in, they will be probably four to five feet from the
19 defendant. They were very concerned about their safety, their
01:32 20 security, and also, the fact that they are understandably very
21 sensitive to the fact that the defendant will be right next to
22 them while they're testifying.

23 So I don't know if there's something that can be done
24 to try to either relocate the defendant or relocate those
25 witnesses so that they are able to give their testimony without

1 the defendant being literally just beyond their arms' reach.

2 THE COURT: Well, I don't think so, is the short
3 answer. There's a lot of different competing considerations to
4 how we set up, and I think it -- I understand what you're
5 saying. I just don't think there's any -- I'll give it some
6 thought, I guess, but my initial reaction is it's unavoidable.
7 He's going to be present in the room someplace with them. I
8 don't know that the number of feet is itself a determinant,
9 but...

01:33 10 MR. MELLIN: Your Honor, I appreciate that he has to
11 be present, it's just that in this layout, he is incredibly
12 close, and that's just something that -- you know, I don't know
13 if you could move the defendant and have him sit where
14 Mr. Bruck is sitting. I'm not sure if the marshals would be
15 okay with that. But we would suggest that there be some change
16 in the way in which this courtroom is currently set up for
17 these witnesses. Because I can tell you, they were very much
18 intimidated by -- and fearful of walking into this courtroom
19 with that defendant being so close to them.

01:34 20 The other issue is one of the witnesses is in a
21 wheelchair, and I'm not sure how the Court wishes to address
22 that. I'll raise that and just leave it to the Court to decide
23 that.

24 THE COURT: Well, we've had that before. We can make
25 an accommodation for that including, perhaps, maybe an entry

1 from another doorway so it's a smoother passage through, for
2 example. I know I've had a juror who was in a wheelchair and
3 we accommodated that. I don't remember the -- we've had -- I
4 think they just sit in front of the witness box.

5 MR. MELLIN: And that, again, put them that much
6 closer --

7 THE COURT: In the past we've been able to do a ramp
8 up to the -- I think to the box itself. I know we did that in
9 the jury box. We ramped up so the person could sit in with the
01:34 10 others. I'm not sure how much would be involved in trying to
11 do that here but --

12 MR. MELLIN: Again, your Honor --

13 THE COURT: -- as the time approaches we could --

14 MR. MELLIN: -- the problem with having the wheelchair
15 in front of the witness box is that once again the witness is
16 now even closer --

17 THE COURT: Actually, it could even be farther away.
18 It could be at the corner of the box.

19 MR. MELLIN: And then the other concern we have, your
01:35 20 Honor, the witnesses, while they're waiting in the witness
21 room, as I understand it will be all the way around and down
22 the hall. So there may be a point in time where it's going to
23 take a few minutes for a few of these witnesses to actually
24 make it from the witness room into the courtroom.

25 I'm not sure if there's something we can do to

1 accommodate that.

2 THE COURT: We can think about that.

3 MS. CONRAD: Your Honor, there was one matter the
4 Court did not address. It was, I think, contained in our
5 status report. It was an evidentiary issue. One of the first
6 20 witnesses was an officer -- or is expected to be, unless
7 there's been a change, Officer Lauren Woods, who
8 attempted -- who was, I think, in the ambulance with Lingzi Lu,
9 one of the deceased victims in this case.

01:36 10 And based on the discovery that we've received,
11 Officer Woods valiantly tried to resuscitate and save Lingzi Lu
12 as what appears to be after the point at which she was dead.
13 And she describes her throwing up, which seems like it was
14 probably an involuntary response after she was already dead.

15 I don't know how much the government intends to go
16 into this. Obviously, the fact that she was present with her
17 and the fact that she's going to testify is one thing, but the
18 question of how much detail she's going to go into starts to
19 sound like really just 403 in terms of its potential impact on
01:36 20 the jury and not being really probative with respect to any
21 issues in this case. I mean, there's no question that she's
22 deceased.

23 THE COURT: Let me just -- this is slightly different
24 from my looking at autopsy pictures or video and so on and so
25 forth because I can't -- I don't know what her testimony will

1 be in its fullness. So I guess that will be the question.

2 MS. PELLEGRINI: First, she wasn't in the ambulance.
3 The officer responded to the scene at the Forum on Boylston
4 Street, and being a police officer, she has some emergency
5 response training -- received medical training, and she did
6 assist with trying to do chest compressions and intubate
7 Lingzi Lu.

8 Ms. Conrad -- as I understand it, the information is
9 that the vomiting which Officer Woods cleared from her is not
01:37 10 an involuntary action. And in any event, her testimony would
11 be that she was making eye contact with Lingzi Lu, who followed
12 her facial movements and who followed her eyes. So she was not
13 dead at that time.

14 It's the government's responsibility again to prove
15 that these victims were killed by a bomb set by the defendant,
16 and we believe strongly that this evidence goes exactly to
17 that, that the evidence prior to Officer Woods getting upon the
18 scene was that Lingzi Lu was walking down the street herself,
19 the bomb went off, and Officer Woods responded to the scene.
01:38 20 There she was, on there, still alive. There was also another
21 witness whose testimony, at least the 302 has been provided to
22 the defense, that she had a pulse, it was thready but it was
23 still there, and that the chest compressions were continuing
24 while she was alive. Whether or not they continued after she
25 had expired is, frankly, of no consequence with respect to the

1 immediacy of Officer Woods' response to Lingzi Lu at that
2 scene.

3 THE COURT: Well, in terms of judging whether the
4 testimony is too much or not, is there some summary that I
5 could look at, whether it's a 302 or other report like that,
6 that would give me some idea of what her testimony would be?

7 MS. PELLEGRINI: Yes, your Honor. I have Officer
8 Woods BPD called an F26. And I can hand it up to the Court.

9 THE COURT: And that gives us an idea of what her oral
01:39 10 testimony would be?

11 MS. PELLEGRINI: Yes. And I just want to be sure I
12 have pulled the various -- yes.

13 THE COURT: Okay.

14 MR. WATKINS: Could we put a Bates number of that
15 document in just so we're clear?

16 MS. PELLEGRINI: I don't remember it off the top of my
17 head.

18 MR. WATKINS: Perhaps the date of it, maybe?

19 THE COURT: Well, it's a two-page memo from Officer
01:39 20 Woods to Captain Ivens, I-V-E-N-S, dated 4/23/2013.

21 MR. WATKINS: Thank you, your Honor.

22 THE COURT: It doesn't have Bates numbers on it.

23 MS. CONRAD: Your Honor, just on that issue,
24 perhaps -- I mean, I realize it's difficult for the Court to
25 determine the exact parameters of the testimony. What we're

1 concerned about, obviously, is the extent to which this becomes
2 inflammatory.

3 I mean, the testimony, the evidence is going to be
4 very graphic and very disturbing, and we get that. And we get
5 that some of it comes with the territory. The question is:
6 Where do you draw the line? And this might be an instance in
7 which a very brief voir dire out of the presence of the jury
8 would help the Court to tailor it without us having to object
9 during the course of what I'm sure will be emotional testimony.

01:40 10 THE COURT: All right. Okay.

11 MR. WEINREB: Your Honor, I have one very minor
12 request, and that is assuming I can get my hands on one, just
13 for purposes of the opening statements, I can substitute a
14 different podium from this one? I'm having trouble with my
15 back that makes it painful to stand for long periods of time
16 unless I can elevate one of my legs, and the other kind of
17 podium, the one that's sort of more solid, has a shelf on the
18 bottom and it makes it perfect to sort of -- so we would bring
19 it in, we would take it out afterwards.

01:41 20 MS. CLARKE: No objection.

21 THE COURT: That sounds fine as long as both sides get
22 to use it.

23 (Laughter.)

24 MR. WEINREB: By all means.

25 MS. CLARKE: As long as both sides don't have to share

1 the backache.

2 May I just have one moment?

3 (Counsel confer off the record.)

4 MS. CLARKE: Your Honor, there is an evidentiary issue
5 but apparently not before opening statement, and that is a
6 timeline that the government intends to introduce. There have
7 been discussions between Mr. Watkins and Ms. Pellegrini that
8 have apparently not proven as fruitful as we'd hoped.

9 THE COURT: Is this a chalk?

01:42 10 MS. CONRAD: That's one of the issues.

11 MS. CLARKE: I think that's one of the questions.

12 MR. WEINREB: Well, the government intends to offer it
13 as evidence. Basically we call it a timeline, but unless I'm
14 mistaken, what it is is a -- it's a series of excerpts from
15 surveillance videos on Boylston Street that have been arranged
16 so that they track the progress of the defendant and his
17 brother as they walk down Boylston Street to the points where
18 they put the bombs. So it's essentially a -- I mean, we could
19 put in each of the surveillance videos and then just cue them
01:43 20 up from the points we wanted to publish them to the jury and
21 play them one after another, and this just essentially makes it
22 easier by putting them together.

23 Now, there are, in addition, the little segments of
24 video that we're going to play are separated by, you know, like
25 a graphic that says what the place is, like the Forum

1 restaurant, but there's nothing more than that.

2 So it would be an exhibit just like any other
3 surveillance video would come into evidence as an exhibit. And
4 frankly, I don't even know what the objection could be. I
5 mean, they could all be played individually one after another,
6 so having a single exhibit that combines them all just
7 streamlines the process of presenting it to the jury and makes
8 it more probative, frankly, because it's easier to follow
9 what's going on.

01:43 10 THE COURT: So is the only fight over whether it goes
11 into the jury room at the end of the case?

12 MR. WATKINS: If I may, Mr. Weinreb is talking about a
13 different issue and a different problem. There is a
14 compilation video that has a different kind of problem to it in
15 addition to whether it's a chalk or an exhibit. There are also
16 these interactive -- what are called interactive Adobe flash
17 exhibits. There are actually two of them. One of them has all
18 kinds of different evidence encapsulated within it. And that's
19 where the real question is going to be.

01:44 20 We're all going to get confused if we try to argue it
21 here without actually seeing them in front of us. If the Court
22 wanted to address this tomorrow, again, given that -- the
23 present work, it didn't seem like it was going to come in
24 during the first couple of days of trial or in opening. We
25 could try to do it tomorrow, if there's a rush to do that, as

1 long as perhaps if we had Friday available, for example, to
2 hash this out. That might be better-served time.

3 I understand them to have said that it's not coming in
4 at the opening.

5 THE COURT: If that's the case, then we could try to
6 find a --

7 MR. WEINREB: So, your Honor, neither one of them -- I
8 mean, they're exhibits. They're not going to be implicated by
9 the opening statements, which is just talk. But --

01:45 10 THE COURT: Well, that's a good question, by the way
11 whether either of you are going to use anything other than talk
12 in your opening statements.

13 MR. WEINREB: Yes. So I've already previewed for the
14 defense, the only things we intend to show the jury during
15 opening statement, with the Court's permission, would be
16 pictures of the four decedents in the case taken before they
17 were injured, just the faces of them, so that the jury sees who
18 the individuals are. And we also plan to -- I plan to read to
19 the jury a portion of the note that he left in the boat. And
01:46 20 there will be a typed version of what I read just so the jury
21 can follow along. It won't be the actual note itself.

22 So -- by the way, though, although those exhibits
23 won't be implicated by the opening, they will come in pretty
24 quickly after we get going.

25 THE COURT: This week?

1 MR. WEINREB: Possibly.

2 MS. PELLEGRINI: I'm sorry. Excuse me.

3 (Counsel confer off the record.)

4 MR. WEINREB: Perhaps not till Monday, but soon.

5 Within the first --

6 THE COURT: If it's not till Monday, we could probably
7 find some time on Friday to do it. I think there may be more
8 pressing things tomorrow.

9 MR. WEINREB: Not until Monday, your Honor.

01:46 10 THE COURT: Okay. All right. Thank you very much.
11 Thank you.

12 THE CLERK: All rise for the Court.

13 (The Court exits the courtroom at 4:17 p.m.)

14 THE CLERK: The Court will be in recess.

15 (The proceedings adjourned at 4:17 p.m.)

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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 9/8/15